No. 344 115

Brief of Harnett

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# IN SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1901.

HARRIET M. ZEIS,
Plaintiff in Error,
vs.
COUNTY OF HAMILTON, ILLINOIS,
Defendant in Error.

*Petition for Certiorari.*
**No. 344.**

## BRIEF OF DEFENDANT IN ERROR.

J. H. HARNETT,
Attorney for Defendant in Error.

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### STATEMENT.

This is a petition presented to this Court for a writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, asking this Court to review the decision of that Court as to the validity of six municipal bonds each for the sum of one thousand dollars with nine interest coupons attached. On October 23d, and November 28th, 1871, the defendant in error issued and delivered to the St. Louis and Southeastern Railway Company two hundred thousand dollars of its municipal bonds each for the sum of one thousand dollars with interest coupons attached. This suit, as originally brought was an action of assumpsit commenced in the United States Circuit Court for the Southern District of Illinois on six of these bonds with the coupons attached thereto. The declaration filed in the case contained a special count on the bonds and coupons and the common counts, but by a stipulation contained in the bill of exceptions it was agreed that the bonds and coupons constitute the only

alleged cause of action on which the suit was brought. A demurrer was filed to the declaration on the ground that the bonds were issued without authority of law. No act of the legislature, either general or special, public or private, having been passed authorizing the voters of Hamilton County to vote to issue the bonds, or the authorities of the county to execute and deliver them. The legal voters of the county at an election held on the 3d day of November, A. D. 1868, voted to issue two hundred thousand dollars in the bonds of the county to the Shawneetown branch of the Illinois Central Railroad Company. Only two acts of the legislature are mentioned on the face of the bonds; one of these is entitled: "An Act to fund and provide for the payment of railroad debts of counties, townships, cities and towns," public laws of Illinois, 1869, page 319, and is a mere registration act that it is admitted conferred no power on the county to issue the bonds. The other is entitled: "An Act to incorporate the St. Louis and Southeastern Railway Company." Approved and in force March 20th, 1869. Private Laws of Illinois 1869, Vol. 3, page 238.

The twentieth section of the last act which is the only act that it is claimed by counsel for plaintiff in error conferred any authority on defendant in error to issue the bonds provides: "And the County Court of Hamilton County is hereby authorized and empowered to subscribe to the capital stock of this company the two hundred thousand dollars or any part thereof heretofore voted by a majority of the legal voters of the county to the Shawneetown branch of the Illinois Central Railroad Company." It will be observed that the vote to issue the bonds was taken on November 3d, 1868. At that time there was no law, public or private, general or special, of the State of Illinois authorizing the issue of the bonds.

The act to incorporate the St. Louis and Southeastern Railway Company was not passed until March 10th, 1869, more than

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four months after the vote to issue the bonds was taken and that act which is the only act under which it is claimed any authority was conferred on the county to issue bonds has been declared unconstitutional and void by the Supreme Court of the State of Illinois.

Sometime after these bonds were isued the county commenced proceedings in the Circuit Court of Hamilton County, Illinois, against the St. Louis and South Eastern Railway Company, the County Clerk, County Collector, State Auditor, and State Treasurer and the "unknown owners of Hamilton County bonds" to have the bonds declared void for want of power in the county to issue them. One, Walter M. Jackson, intervened in the suit claiming to own one hundred and five of the two hundred bonds for one thousand dollars each issued by Hamilton County, and on the grounds of diverse citizenship removed the case into the United States Circuit Court for the Southern District of Illinois. After that Mr. Jackson filed a cross bill in the case against the county, and on June 5th, 1881, the county having failed to answer and made default a decree was rendered on the cross bill describing by their numbers each of the one hundred and five bonds owned by Jackson and holding them legal and valid obligations of the county. The other ninety-five, of which the six sued on in this case form a part, were not mentioned or described in the cross bill nor decree, and as to them there was no decree or adjudication whatever.

Suit was brought in the United States Circuit Court for the Southern District of Illinois on some of the bonds formerly owned by Jackson and described in the foregoing decree and on some of the ninety-five bonds not described, and not included in that decree and the Court held the one hundred and five bonds formerly owned by Jackson and described in the decree valid and the ninety-five not owned by him and not described in the decree void. That case was taken to the United States Circuit

Court of Appeals for the Seventh Circuit and the judgement of the Circuit Court was affirmed and the case is reported in Austin vs. Hamilton County, 76 Fed. Rep. 208.

In the Austin case plaintiff alleged the substance of the proceedings in the Jackson chancery case where the bonds owned by Jackson were held valid and relied solely upon the adjudication in favor of Jackson in the chancery suit to sustain the validity of the bonds sued upon. And the Court of Appeals for the Seventh Circuit solely upon the ground of *res adjudicata* held the bonds formerly owned by Jackson and described in the chancery decree valid and the others not included in the Jackson decree void. The constitution of the State of Illinois adopted by the vote of the people on July 2d, 1870, absolutely prohibited all municipal corporations from voting bonds to aid in the construction of railroads after that date unless such bonds had been previously authorized under existing laws by a vote of the people of such municipality prior to the adoption of the constitution. Municipal bonds in the State of Illinois issued since the adoption of the constitution of 1870 as these bonds were, are *prima facie* invalid, and the burden of proof rests upon the plaintiff to show affirmatively that they were authorized under existing laws by a vote of the people prior to that time.

In the declaration in this case there is no allegation whatever about the bonds formerly owned by Jackson being held valid in the former adjudication. As it appeared upon the face of the plaintiff's declaration that these bonds were issued without authority of law and in direct violation of the positive prohibition of the constitution of 1870 having been issued after the constitution went into effect, and that there never was any law passed by the State of Illinois, general or special, public or private, authorizing the issue of these bonds, nor any former adjudication holding these particular bonds valid, the defendant demurred to the plaintiff's declaration and the Court sustained the demurrer

and the plaitiff electing to stand by her declaration judgement was rendered against plaintiff for costs. From that judgement the plaintiff in error prosecuted a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit and the judgement of the Circuit Court was affirmed by the Court of Appeals, and the opinion of the Court in affirming the judgement is reported in Zane vs. Hamilton County, Illinois, 104 Fed. Rep. 63. A petition for a rehearing was filed in the Court of Appeals by the plaintiff in error, and her petition for rehearing was denied.

Plaintiff in error having failed in the Court of Appeals to reverse the judgment of the Circuit Court, and having failed on her petition for a rehearing to obtain a rehearing of the cause, now presents her petition for writ of certiorari to this Court under the second clause of the sixth section of the act of Congress, approved March 3d, 1891, creating the United States Circuit Court of Appeals. That clause provides: "And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." The only error assigned is in sustaining defendant's demurrer to plaintiff's declaration.

## I.

## BRIEF OF THE ARGUMENT.

### Bonds Void on Their Face.

There was no authority of law for issuing these bonds and an examination of the acts referred to on the face of each bond supposed to confer authority will demonstrate that the bonds were issued without authority of law and are void. Each bond recites that it is one of two hundred bonds of like tenor and amount, and is issued under and by virtue of the authority given by a majority of all the legal voters of the county by their vote at an election held in pursuance to law on November 3d, 1868, and by authority given by an act of the general assembly of the State of Illinois, in force March 10, 1869, entitled: "An Act to incorporate the St. Louis and Southeastern Railway Company." The act of April 16, 1869, which is merely an act authorizing the registration of the bonds, is also referred to, but that act conferred no power on the people of the county to vote to subscribe to the capital stock of any railroad. The benefits of that act cannot apply to any debt unless the subscription creating such debt was first submitted to an election of the legal voters of the county under the provisions of an existing law authorizing such vote to be taken, and a majority of the legal voters living in the county were in favor of such subscription. These are all the acts referred to on the face of the bonds purporting to grant power to issue them. The election of Nov. 3, 1868, was to subscribe two hundred thousand dollars to the Shawneetown branch of the Illinois Central Railroad Company. An examination of the act to incorporate the Shawneetown branch of the Illinois Central Railroad Company, private laws of Illinois, 1865, Vol. 2, pp. 218-220, will show that their was no authority conferred on the people of the county to vote on that subject, and no author-

ity to issue the bonds. In fact, there was no law, public or private, general or special, authorizing the vote of Nov. 3, 1868, or the county to act in regard to these bonds. The entire proceedings relating to the vote, and to the issue of the bonds was without authority of law and void. The purchasers of the bonds were bound to know that the vote of Nov. 3, 1868, was upon the proposition to subscribe two hundred thousand dollars in stock to aid in constructing the Shawneetown branch of the Illinois Central Railroad, and that the act incorporating that company contained no power or authority of any kind authorizing the county to vote upon that subject or to subscribe stock, issue bonds or make donations of any kind. They were bound to know that the act of March 10, 1869, incorporating the St. Louis and Southeastern Railway Company, private laws of Illinois 1869, Vol. 3, p. 238, by authority of which it is specified on the face of each of the bonds it was issued, conferred no power or authority on the county to issue bonds or to levy and collect taxes to pay the interest or principal thereof. No part of that act had any reference to the bonds in question, except the 20th section, and that only purported to authorize the County Court to subscribe the bonds alreardy voted to another railroad company to the St. Louis and Southeastern Railway Company without submitting the question of such subscription to the vote of the people of the county. It is self-evident that the act of March 10, 1869, incorporating the St. Louis and Southeastern Railway Company, under the 20th section of which it is claimed authority exists, was passed after the vote of March 3, 1868, had been taken. Hence, nothing contained in the act of March 10, 1869, could supply or make good the want of power in the act of 1865 to incorporate the Shawneetown branch of the Illinois Central Railroad Company under which the vote of March 3, 1868, was taken.

Section 20 of the act to incorporate the St. Louis and Southeastern Railway Company conferred no power to issue the bonds

for that section has been held to be in violation of article 3 of section 23 of the constitution of Illinois adopted in 1848, (Starr & Curtis' Illinois Annotated Statutes, Vol. 1, p. 72), which provides that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title."

The Supreme Court of Illinois in the People ex rel Standefer, collector, vs. Hamill, 134 Ill. 670, 671, opinion filed June 16, 1888, in holding section 20 of the foregoing act to be in violation of article 3 of section 23 of the constitution of 1848 said:

"First—As respects the $200,000 bonds issued to the St. Louis and Southeastern Railroad Company, it is not claimed they were ever authorized, by any vote of the people of the county, to be issued to that particular corporation, either in payment for stock or otherwise. It is claimed, however, that at an election held on the 3d day of November, 1868, the voters of the county elected to subscribe $200,000 to the capital stock of the Shawneetown branch of the Illinois Central Railroad, and authorized the issuing of bonds to that amount in payment for a like amount of stock in that company, and that by the 20th section of the act to incorporate the St. Louis and Southeastern Railroad Company, approved March, 1869, the county was authorized and empowered to subscribe to the capital stock of such railway company the $200,000, or any part thereof, voted by a majority of the legal voters of the county, to the 'Shawneetown branch of the Illinois Central Railroad.' There is no pretense there is any enabling act other than the act of March 10, 1869, under which the county of Hamilton could have subscribed for $200,000 stock in the St. Louis and Southeastern Railroad Company, and issued the bonds in question for the payment; and as the point made, that that section of the charcter of the corporation authorizing such subscription is unconstitutional, must be sustained, it is fatal to the validity of this whole series of bonds.

"It is seen the act of March 10, 1869, to which reference is made as giving the requisite authority to the county to subscribe for the stock and issue the bonds, is 'An act to incorporate the St. Louis and Southeastern Railroad Company.' That is all it purports to be by its title. The constitution of 1848, under which this act was passed, contained a restriction that 'no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title.' This is a private or local act, and although the subscribing by counties, etc., to the capital stock of the corporation thereby created, is germane to the object expressed in the title (Belleville, etc., Railroad Co. vs. Gregory, 15 Ill. 20, City of Virden vs. Allen, 107 Id. 505,) the diversion to that corporation of a subscription theretofore authorized by a vote of the people to be made to a different corporation is a wholly different thing. That, it is to be presumed, affects, adversely, the corporation from which the subscription voted is to be diverted, and is, therefore, clearly not germane to the title of the act, and section 20 must therefore be held to have been inhibited by the constitution of 1848, and is for that reason void and of no effect. (Lockport vs. Gaylord, 61 Ill. 276; Middleport vs. Aetna Life Ins. Co., 82 Id. 562.)

"It is well settled by the previous decisions of this court, that municipal bonds issued for stock in railroad corporations, without authority of law, are void, no matter into whose hands they may come."

The act of April 16, 1869, Public Laws of Illinois, 1869, p. 319, the only remaining act recited on the face of the bonds purporting to show authority for issuing them, grants no power or authority to issue bonds, but only provides when such bonds have been issued under authority of law how they shall be paid, and if the question of creating such a debt was first submitted to an election of the legal voters of the county under the pro-

visions of the laws of the State and a majority of the votes cast were in favor of such subscription, then, under section 7 of the act, the bonds might be registered in the office of the Auditor of State. It is not pretended or claimed, that there was any power or authority to issue these bonds under the act of Nov. 6, 1849, authorizing counties to subscribe to the capital stock of railroad companies not exceeding $100,000 under certain restructions therein named. It is self-evident the vote of Nov. 3, 1868, was not taken under that statute, for by it $100,000 is the maximum amount that can be voted by any county. Under the power to subscribe $100,000 the voting and issuing of $200,000 in the bonds of the county would be absolutely null and void for want of power and authority in the county to act at all. It is certain that there was no law, public or private, general or special, in the State of Illinois authorizing these bonds to be either voted or issued by the county. It is well settled that the purchasers of such bonds are bound to take notice of the recitals in the bonds, the records in the county court in relation to the voting and issuing of the bonds, the acts of the general assembly specified on the bonds and the laws or constitution of the State in force at the time of voting upon and time of issuing the bonds. It is contended that the recitals in the bonds estopped the defendant from denying their validity and it is claimed that on their face they import a compliance with the law under which they were issued. But counsel have failed to show that there was any law authorizing the issue of the bonds. This court has never intended to decide, and has never decided even where the rights of *bona fide* holders have been involvd, that where the bonds have been issued without legislative authority that they are valid and binding against the municipal corporation issuing them.

Mr. Justice Harlan in delivering the opinion of the Court in Northern Bank of Toledo vs. Porter Township, 110 U. S. 615, on this question says: "These recitals, counsel argue, import

a compliance, in all respects, with the law, and therefore, the township will not be allowed, against a *bona fide* holder for value, to say that the circumstances did not exist which authorized it to issue the bonds. It is not to be denied that there are general expressions in some former opinions which, apart from their special facts, seem to afford support to this proposition in the general terms in which it is presented. But this Court said in Cohens vs. Virginia, 6 Wheat. 264; and again in Carroll vs. Lessee of Carroll, 16 How. 275, 287, that it was a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which they are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

"An examination of the cases in which those general expressions are found will show that the Court never intended to adjudge that mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation precluded an inquiry, even where the rights of a *bona fide* holder were involved as to the existence of legislative authority to issue them." The distinction so clearly pointed out in this case as to what facts the municipal corporation will be estopped from denying ,and what it is not estopped from denying, runs through all the decisions, as an examination will show. If the bond on its face recites that an election was held and that all other steps required by law were taken before the bonds were issued, these are facts, and the corporation will be estopped from denying them. It has never been held that the corporation was estopped from denying that there was no legislative authority for issuing the bonds. It is only as to matters of fact that the corporation can be estopped, and not as to matters of law. Whether there was legislative authority for issuing them is always a question of law. In Post vs. Supervisors, 105 U. S. 668, 669, Mr. Justice

Gray in delivering the opinion of the Court, laid down these propositions:

"Second—Whether a seeming act of the legislature is or is not a law is a judicial question to be determined by the Court and not a question of fact to be tried by a jury."

"Fourth—An act of the legislature of a State, which has been held by its highest court not ot be a statute of the State because never passed as its constitution required, cannot be held by the Courts of the United States, upon the same evidence to be a law of the State."

"Fifth—That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value and in the belief that they have been lawfully issued."

In Katzenburger vs. Aberdeen, 121 U. S. 176, 177, Mr. Chief Justice Waite, in delivering the opinion of the Court, said: "Legislative authority, express or implied, to pass the ordinance must be shown. The recital, therefore, in its present form, is of matter of law only, because it implies the existence of no special facts affecting the case, except the issue of the bonds under the ordinance to pay the subscription to the stock without any vote of the electors to be taxed therefor. It is in effect nothing more than a recital that bonds issued under such circumstances were under and pursuant to law, and the charter of the city. Such a recital does not estop the city from asserting the contrary. To hold otherwise would be to invest a municipal corporation with full legislative power and make it superior to the laws by which it was created. Dixon County vs. Field, 111 U. S. 92."

In McClure vs. Township of Oxford, 94 U. S. 432, Mr. Chief Justice Waite, in delivering the opinion of the Court, said: "A municipal corporation must have legislative authority to sub-

scribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account. Municipal officers cannot rightfully dispense with any of the essential forms or proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter, of such a subscription. If they do, the bonds will be invalid in the hands of all that cannot claim protection as *bona fide* holders. To be a *bona fide* holder one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued is bound to take notice of the statute and of all its requirements."

In Crow vs. Oxford, 119 U. S. 221, Mr. Justice Blatchford, in delivering the opinion of the Court, said: "The plaintiff, being referred by the bonds to the act of March 1st, 1872, as the statute under which they were issued, was bound, as was said in the McClure case, to take notice of the statute and all of its requirements. If, finding the bonds invalid under that statute, as he is held by law to have done, he claims the right to refer to the act of March 2d, 1872, as the source of authority, because that act was in force from March 7, 1872, he was bound to take notice of the requirements of that act." In the same case on page 226 in regard to the recitals in the bond it was said: "As the recitals in the bond here are of no avail to the plaintiff, as before shown, so the certificate of the auditor does not aid him. The bonds on their face excluded the possibility of their having been issued under the act of March 2d, 1872, and as the public records showed that the proceedings were not taken under that act, and as the auditor was authorized by section 14 of that act only to register bonds issued under that act, and as these bonds

did not fall within the purview of bonds authorized to be registered by him under section 15, of that act, it follows that the auditor had no right to decide, as matter of law, that the bonds were bonds of a kind which he was authorized by the act of March 2d, 1872, to register and certify, when, as a matter of law, they were not."

In Kelly vs. Millan, 127 U. S. 150, Mr. Justice Blatchford, in delivering the opinion of the Court, said: "It is well settled that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation must have such power conferred upon it by a grant from the legislature; and that even the power to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment of the subscription, unless the power to issue such bonds is expressly or by reasonable implication conferred by statute."

If it appears upon the face of the bonds sued on as in this case, that they were issued under a certain act mentioned in the bonds and that act is void, the bonds themselves will be void.

Gilson vs. Dayton, 123 U. S. 59.

Lippincot vs. Town of Pana, 92 Ill. 34.

Gaddis vs. Richland County 92 Ill. 126.

Barns vs. Town of Lacon, 84 Ill. 464.

Middleport vs. Aetna Life Ins. Co. et al., 82 Ill. 564.

Marshall vs. Sillimon et al., 61 Ill. 223.

An examination of every case cited by counsel for plaintiff in error will show that in each of these cases there was legislative authority given to issue the bonds. These decisions, therefore, have no application to the facts in this case. The courts have never held that where there was no legislative power given to issue the bonds that the corporation was estopped from denying want of authority. If a municipal corporation was estopped from

denying that it had no legislative authority for issuing the bonds, then bonds issued without authority of law in the hands of a *bona fide* purchaser would be as valid and binding as those issued under authority of law. No Court for the purpose of protecting a *bona fide* holder has ever gone to the extent of holding that bonds issued without legislative authority are as valid and binding as those issued by authority of law. Recitals in bonds which estop the corporation issuing them do not extend to or cover matters of law. All parties are equally bound to know the law, and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when in fact they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Dixon vs. Field, 111 U. S. 92. Recitals in bonds issued under legislative authority may estop the municipality from disputing their authority as against a *bona fide* holder for value, but when the municipal bonds are issued in violation of law, or a constitutional provision no such estoppel can arise by reason of any recitals contained in the bonds.

Lake County vs. Rawlins, 130 U. S. 662.

Lake County vs. Graham, 130 U. S. 674.

Sutliff vs. Lake County Commissioners, 147 U. S. 230.

It cannot be contended that the Supreme Court of Illinois had never construed article 3, of section 23, of the constitution of 1848, until it construed it in the people on the relation of Standefer vs. Hamill, 134 Ill. 666, or that it gave that section a different construction in that case to what it had formerly given it in former cases. As early as 1863, the Supreme Court of Illinois in the case of the People ex rel vs. Mellen, 32 Ill. 181, gave a construction to this same section of the constitution of 1848 and held an act of the general assembly void for the same reason. The Supreme Court of Illinois having decided

that the 20th section of the act to incorporate the St. Louis and Southeastern Railway Company, was a violation of article 3, of section 23, of the constitution of 1848, under the rule laid down and uniformly adhered to by this Court, the United States Courts will follow that decision and hold section 20 unconstitutional and void. That section being void there was no authority of law to issue these bonds.

In Post vs. Supervisors, 105 U. S. 669, Mr. Justice Gray, in delivering the opinion of the Court, laid down this proposition:

"Fourth—The construction uniformly given to the constitution of a State by its highest court is binding on the Courts of the United States as a rule of decision."

In that case it was held that the act of the general assembly of Illinois, under which the bonds in suit were issued, having been adjudged by the Supreme Court of the State to have never become a law, the decision of the State Court on that subject must govern the action of the Courts of the United States and the bonds were held void.

This court has held that it will abandon its former decision construing a state statute if the State Courts have subsequently given to it a different construction.

Fairfield vs. County of Gallatin, 100 U. S. 54-55.

Green vs. Neal's Lessee, 6 Pet. 291.

Sudam vs. Williamson, 24 How. 427.

The decisions of the highesft judicial tribunal of a State are entitled to great and ordinarily decisive weight.

Rich vs. Mentz Township, 134 U. S. 632.

Meriwether vs. Muhlenberg County Court, 120 U. S. 354-357.

Claybourne County vs. Brooks, 111 U. S. 400, 410.

When the construction of the constitution or the statute of a State has been fixed by an unbroken series of decisions of its highest Court, the Courts of the United States accept and apply it in cases before them.

Township of Elmwood vs. Mercy, 92 U. S. 289.

Township of Oakland vs. Skinner, 94 U. S. 255.

Barnum vs. Okolona, 148 U. S. 393.

In Burgess vs. Seligman, 107 U. S. 33, Mr. Justice Bradley, in delivering the opinion of the Court and reviewing the authorities upon this subject, said: "Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is."

In Austin vs. Hamilton County, 76 Fed. Rep. 208, the United States Circuit Court of Appeals for the Seventh Circuit held void some of the same issue of bonds involved in this suit which were not included in the Jackson chancery decree; and those included in the decree valid. In that case the plaintiff in his declaration did not rely upon their being any authority of law authorizing the bonds to be issued, but relied solely upon the former adjudication in the chancery suit. The declaration in this case is not based on any former adjudication nor is there any averment in it that the plaintiff was a purchaser of the bonds in good faith but plaintiff relies solely upon the act of March 10th, 1869, for authority to issue the bonds when it is admitted that this act has been declared unconstitutional and

void by the Supreme Court of Illinois. On page 210 of the Austin case the court say: "The declaration, it is to be observed, contains no averment to the effect that plaintiff was a purchaser of the bonds in good faith. On the contrary, his reliance is shown to have been solely upon the adjudication in favor of Jackson in the chancery suit. Indeed, the declaration may be taken as a concession to the contention of counsel for defendant in error that outside of section 20 of the act for the incorporation of the St. Louis and Southeastern Railway Company there was no authority for the execution of these bonds." In reference to the bonds not included in the chancery suit on page 212 of the Austin case the Court say: "The other six bonds do not come within the estoppel because it does not appear that they were held by any one who was a party to the decree; and the plaintiff in error is not in a situation to ask as he does that in order to uphold them we disregard the decision of the Supreme Court of the State and follow the earlier ruling of the United States Circuit Court in the chancery suit. It does not appear that he obtained the six bonds either directly or remotely from an innocent holder for value, and, as already stated, it must be assumed that he did not buy them until after the State Court had declared them invalid."

In the case of Bolles et al. vs. Hamilton County, Illinois, 74 Fed. Rep. 207, the same issue of bonds were involved as are involved in this suit. A portion of the bonds and coupons sued on in that case were included in the chancery decree and the others were not, and the Court held the former valid and the latter void. In every suit involving the validity of the $200,000 in bonds issued by Hamilton County to the St. Louis and Southeastern Railway Company that has been tried in the United States Courts it has never been held that any of the bonds not included in the chancery suit in the Jackson case were legal and valid obligations against the county. On the contrary, it has

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been held in every case in which these bonds were involved, both by the United States Circuit Court for the Southern District of Illinois and the United States Circuit Court of Appeals for the Seventh Circuit that these bonds were void, and that there was no power to issue them, and the only reason the bonds included in the chancery suit was held valid was on account of the question of their validity being *res adjudicata* by the decree in the chancery case.

In affirming the judgment of the United States Circuit Court for the Southern District of Illinois sustaining the demurrer to the declaration in this case the United States Circuit Court of Appeals for the Seventh Circuit in Zane vs. Hamilton County, Illinois, 104 Fed. Rep. 63, 64, say: "The question is whether there was authority of law for the issue of the bonds. The bonds bear date October 23d, 1871, and were not executed before that date. They are a part of the issue of $200,000 referred to in the case of Austin vs. Hamilton County, 76 Fed. Rep. 208, but are not a part of the 105 bonds which, as shown in that case, had been owned by Walter M. Jackson, and in a suit to which the county and he were parties, had been adjudged to be valid.

The only authority asserted for the issue of the bonds is section 20 of the act of March 10, 1869, whereby the St. Louis and Southeastern Railway Company was incorporated. In People vs. Hamill, 134 Ill. 666, where the validity of these bonds was in issue it was held that they were invalid because section 20 of the act mentioned was void as being in violation of the provision of the constitution of the State (article 3, section 23), that 'no private or local law * * * shall embrace more than one subject and that shall be expressed in the title.' This Court recognized the authority of that decision in the Austin case and must recognize it now. It follows that the bonds were issued without authority of law and in the hands of any and all holders unless, like Jackson they can claim under an unreversed ad-

judication must be regarded invalid. No recital can supply the want of legal authority for their execution. The judgment below is affirmed."

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## II.

### Bonds Issued in Violation of Constitution Void.

Municipal bonds in Illinois, issued since the adoption of the constitution of 1870 as these bonds were, are *prima facie* invalid, and the burden of proof rests upon the plaintiff to show affirmatively that they were authorized under existing laws by a vote of the people prior to that time.

McClure vs. Township of Oxford, 94 U. S. 429.

Buchannan vs. Litchfield, 102 U. S. 278.

German Savings Bank vs. Franklin County, 128 U. S. 526.

Jackson County vs. Brush, 77 Ill. 59.

These bonds were issued in violation of separate section 2 of the constitution of 1870 which went into force July 2d, 1870. That section provides that: "No county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." Separate section 2 of the constitution of 1870. Starr & Curtis' Annotated Statutes, Vol. 1, p. 203. As these bonds were not authorized to be issued under any exist-

ing law by a vote of the people of the county prior to the adoption of the constitution, they do not fall within the proviso of the foregoing section. It is well settled that all negative or prohibitory provisions even in a constitution execute themselves, making void all acts done in violation of such provisions, the same as if in violation of express statutory law.

Law et al. vs. People ex rel, 87 Ill. 385.
Fuller vs. City of Chicago et al., 89 Ill. 282.

The bonds on their face bear date October 23, 1871, and therefore every purchaser of them was bound to know that they were issued after the positve prohibition of the constitution had been adopted, preventing every municipality in the State from voting to become a subscriber to the capital stock of any railroad or private corporation. Under these circumstances there can be no such thing as a *bona fide* purchaser of these bonds for it appears upon the face of each bond that it was issued in violation of the prohibition of the constitution and is therefore void.

In Concord vs. Robinson, 121 U. S. 169, the Supreme Court of the United States, by Mr. Justice Harlan, said: "Since that day (July 2, 1870) no municipal corporation of Illinois has possessed authority to subscribe to the capital stock of a railroad or private corporation, or to make donations to, or loan its credit to them, except that a subscription or donation lawfully voted by the people before the adoption of that section could be completed, upon the terms and conditions provided by the electors. There is no saving of the right of such corporations to loan their credit to railroad corporations where such loan of credit was not embraced in a vote previously taken under *existing laws*, and which was favorable to the subscription of stock or a donation."

The Courts concur with great unanimity in holding that there

is no authority in municipal corporations to incur debts or borrow money in order to become subscribers to the capital stock of a railway corporation and that such power must be conferred by *express grant.*

Dillon on Municipal Corporations, Fourth Edition, Vol. 1, Section 161.

Kelly vs. Milan, 127 U. S. 139.

Norton vs. Dyersburg, 127 U. S. 160.

Wells vs. Supervisors, 102 U. S. 625.

Concord vs. Robinson, 121 U. S. 165.

Lewis vs. City of Shreveport, 108 U. S. 282, 283.

If the power to issue bonds in aid of a railway company does not exist, they are void into whosoever's hands they may come.

Dillon on Municipal Corporations, Fourth Edition, Vol. 1, Section 163.

March vs. Fulton County, 10 Wall. 676.

Allen vs. Louisiana, 103 U. S. 80.

A municipality must have affirmative legislative authority to enable it to subscribe to the capital stock of a railroad corporation before its officers can bind the body politic to the payment of bonds purporting to be issued on that account, and if it has not such authority the bonds will be void into whosesoever's possession they may come.

McClure vs. Township of Oxford, 94 U. S. 432.

Township of East Oakland vs. Skinner, 94 U. S. 255.

Town of Concord vs. Portsmouth Savings Bank, 92 U. S. 625.

It is claimed that by subsequent ratification the county may

make legal and valid bonds that, when they were issued, were illegal and void. The legislature never made any attempt to ratify, confirm or legalize these bonds. Even the legislature had no power to ratify and confirm bonds that were issued without authority of law and in violation of the constitution. A municipal corporation may ratify the unauthorized acts and contracts of its agents, and officers which lie *wtthin the seope of the corporate powers, bui not otherwise. But a subsequent ratification cannot make valid an unlawfal act without the scope of corporate authority.* If the unlawful and unauthorized acts of the officers of a municipal corporation can confer power where it is absolutely prohibited by the constitution, then the constitutional prohibition would be entirely powerless to prevent the very evil it was intended to remedy, and the doing of the very acts it absolutely prohibited and declared should not be done would make them legal and valid, according to the logic of counsel for plaintiff in error. An absolute excess of authority by the officers of the municipal corporation, in violation of the law cannot be upheld.

Dillon on Municipal Corporations, Fourth Edition, Vol. 1, Section 463.

Corporate ratification without authority from the legislature cannot make a municipal bond valid which was void when issued, for want of legislative power to make it.

Lewis vs. City of Shreveport, 108 U. S. 282.

Marsh vs. Fulton County, 10 Wall. 676.

The legislature itself cannot confer any power on the county to ratify bonds issued without authority of law and in plain violation of the constitutional prohibition.

As no legislative authority or grant of power by the legislature to the county to enable it to subscirbe to the capital stock of the railroad company, and issue bonds in payment of such subscrip-

tion is shown in the declaration, or on the face of the bonds there was no power in the county to issue them, and the bonds having been having been issued after the constitution went into effect, and in plain violation of the constitutional prohibition, the bonds are absolutely void into whosesoever's hands they may come. and as bonds that are void can create no liability against the county, the demurrer to the declaration was properly sustained.

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## III.

### Petition for Certiorari should be Denied.

While under the statute creating the Circuit Court of Appeals it is competent for this Court to require any judgment or decree of the Circuit Court of Appeals which it sees fit to be certified to this Court for review and determination, yet if it grants the writ in this case then every case in which the judgment or decree of the Circuit Court of Appeals is by the statute made final can be reviewed by this Court, and the decision of the Circuit of Appeals would not be final in any case. Such a construction of the statute would nullify and abrogate all that part of the 6th section of the act creating the United States Circuit Court of Appeals, which provides that the "judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States, etc." The statute itself does not require this Court in every case where a petition for certiorari is presented or where a party to a judgment or decree in the Circuit Court of Appeals has been defeated in a case where its judgment or decree is final, and such party wants the judgment of that Court reviewed by this Court, to require such case to be certified to this Court for its review and determination.

If in a case where the statute has made the judgment or decree of the Circuit Court of Appeals final, the defeated party can, by filing a petition for certiorari in this Court, obtain a review by this Court of the judgment or decree of the Circuit Court of Appeals, then every defeated party to a judgment or decree of the Circuit Court of Appeals can repeal the statute by filing his petition for certiorari in this Court. The filing of the petition for certiorari in this Court does not of itself operate to bring before the Court the judgment or decree of the Circuit Court of Appeals sought to be reviewed. The statute lodges in this Court the exclusive power and right to determine without restriction in what cases it will order by certiorari, or otherwise, judgments or decrees of the Circuit Court of Appeals to be certified to this Court for its review and determination. And it is only such cases as this Court upon its own deliberate judgment and determination shall decide there are good and sufficient reasons presented by the petition for certiorari in which it will require the judgments or decrees of the Circuit Court of Appeals that are by the statute made final to be certified to this Court for its review and determination.

Whether the amount involved in the litigation or the principles of law applicable to the facts of the case are considered, there are no reasons shown in the petition for certiorari or in the brief in support of it why the prayer of the petition should be granted. The amount involved is not large and there are no other cases or collateral interests dependent on the decision of this case. The principles of law applicable to the facts could not be plainer more elementary or better settled. On the same facts in reference to the same issue of bonds the United States Circuit Court for the Southern District of Illinois has on the trial of three or more different cases held this same issue of bonds by defendant in error void and in each case its judgment was affirmed by the United States Circuit Court of Appeals for the

Seventh Circuit. When it has been shown that there was no law in existence at the time voters of the county voted to issue the bonds authorizing the voting and issuing of the bonds, and that they were issued without authority of law, and in plain violation of a positive prohibition of the constitution of the State, and when all these matters appear in the petition for certiorari presented to this Court in candor and fairness, what is there presented in such a case to be reviewed by this Court? Does counsel for plaintiff in error contend that where bonds were issued without authority of law and in plain violation of a positve prohibtion of the constitution of the State under an act declared to be in violation of the constitution of the State by the highest court in the State,—that this Court will declare them legal and valid obligations of the county? To contend for such a bald proposition in view of the long and unbroken line of the decisions of this Court on this question and the elementary principles of law upon which these decisions are based is to throw aside all legal principles and precedents and ask this Court to review and reverse the judgment of the Circuit Court of Appeals in this case, merely because the plaintiff in error is not satisfied with it. There being no reasons presented in the petition for certiorari or in the brief in support of it, why the writ should be granted and the judgment of the Circuit Court of Appeals being final as the jurisdiction of that Court, as is shown on the face of the petition was dependent solely upon the diverse citizenship of the parties the writ should be denied.

Respectfully submitted,

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